

CHARLES CONNELLY, LIANE JOHNSON, and DON RACINE
v.
ACTING BILLINGS AREA DIRECTOR, BUREAU OF INDIAN AFFAIRS

ROGER WALTER
v.
ROCKY MOUNTAIN REGIONAL DIRECTOR, BUREAU OF INDIAN AFFAIRS

IBIA 99-89-A, 99-90-A,
99-91-A, 00-23-A

Decided August 25, 2000

Appeals from decisions concerning the allocation of grazing privileges on the Blackfeet Reservation.

Reversed and remanded.

1. Bureau of Indian Affairs: Administrative Appeals: Generally--
Indians: Leases and Permits: Farming and Grazing--Indians: Tribal
Powers: Tribal Sovereignty

Where an appeal concerning allocation of grazing privileges under 25 C.F.R. § 166.10 is filed with a Bureau of Indian Affairs Regional Director, and the appellant raises issues that are within the primary jurisdiction of an Indian tribe, the Regional Director may stay proceedings in the appeal in order to allow the appellant to exhaust tribal remedies.

APPEARANCES: Thane P. Johnson, Esq., Cut Bank, Montana, for Appellants.

OPINION BY ADMINISTRATIVE JUDGE VOGT

Appellants Charles Connelly (IBIA 99-89-A), Liane Johnson (IBIA 99-90-A), Don Racine (IBIA 99-91-A), and Roger Walter (IBIA 00-23-A) seek review of two decisions concerning the allocation of grazing privileges on the Blackfeet Indian Reservation. The first decision was issued by the Acting Billings Area Director, Bureau of Indian Affairs (BIA), on July 2, 1999. It was a consolidated decision addressing separate appeals filed by Charles Connelly, Liane Johnson, Don Racine, and three others. The second decision was issued on

October 15, 1999, by the Rocky Mountain Regional Director, BIA (Regional Director), 1/ and addressed an appeal filed by Roger Walter. In both decisions, the Regional Director held that he lacked jurisdiction over the appeals. For the reasons discussed below, the Board reverses the Regional Director's decisions and remands these appeals to him for further proceedings.

Background

Sometime prior to August 31, 1998, the Superintendent, Blackfeet Agency, BIA, issued a notice titled "Allocation Applications." The undated notice was in the form of a memorandum addressed to "All permittees and potential permittees." It stated that the Blackfeet Tribe had not yet enacted a grazing resolution for the permit period beginning in March 1999. 2/ The notice, however, requested that applicants for grazing allocations for the new period submit their applications to the Agency by August 31, 1998.

On November 3, 1998, the Blackfeet Tribal Business Council (Business Council) enacted Resolution 27-99, governing grazing privileges on the Blackfeet Reservation for the permit period beginning March 10, 1999, and ending March 9, 2009. The resolution was approved by the Superintendent on November 20, 1998. 3/

1/ In September 1999, the Billings Area Office became the Rocky Mountain Regional Office, and the Area Director became the Regional Director. In this decision, the official will be called the Regional Director, regardless of the time period concerned.

2/ The then-extant grazing resolution, Resolution 141-89, was due to expire on Mar. 9, 1999.

3/ Part VII.A of Resolution 27-99 provides:

"The following procedures shall apply in the awarding of allocations:

"(1) The Allocation Committee will issue a written notice of award of allocation of grazing privileges on or before December 10, 1998, and on or before December 1 of each year thereafter. The written notices will be sent by certified mail immediately to each applicant who is affected by the Committee's decision. A list of the written notices shall be made available to the public.

"(2) Unsuccessful applicants for allocations may appeal to the Allocation Committee by December 22, 1998, and on or before December 15 of each year thereafter. The appeal shall be in writing and shall state the specific grounds upon which the decision of the Allocation Committee is being appealed. The appeal shall be limited to the notice or notices of award on the range units for which the applicant has applied.

"(3) The decision of the Allocation Committee shall be final. The final decision shall be sent to the Superintendent on or before January 15 of each year.

"(4) The Allocation Committee and the Superintendent shall jointly issue any necessary permits for the allocation of grazing privileges."

All Appellants state that they submitted their allocation applications prior to enactment of Resolution 27-99. 4/ All received letters dated January 28, 1999, from the Chairman of the Blackfeet Tribal Allocation Committee (Allocation Committee), stating:

This letter is to advise you that your Application for Allocation of Range Unit(s) [various numbers] has been denied by the Blackfeet Allocation Committee. This decision was made in accordance with Blackfeet Tribal Resolution No. 27-99.

This decision may be appealed to the Allocation Committee, * * *, in accordance with the regulations in Resolution No. 27-99, Part VII(1)(2). Your notice of appeal must be filed in this office within 10 days of the date you receive this decision. * * * The appeal shall be in writing and shall state the specific grounds upon which the decision of the Allocation Committee is being appealed.

All Appellants filed appeals and were granted hearings before the Allocation Committee, apparently during February 1999. 5/ All state that they did not learn the reasons for denial of their applications until their hearings.

Sometime prior to March 12, 1999, the Allocation Committee issued a notice stating in part:

NOTICE TO ALLOCATION APPLICANTS

The Blackfeet Tribal Allocation Committee has received applications which were timely filed on or before November 13, 1998, and are incomplete and do not comply with the requirements of Blackfeet Tribal Resolution No. 27-99, entitled GRAZING PRIVILEGES ON THE BLACKFEET INDIAN RESERVATION. The Allocation Committee has decided to allow these applicants until March 12, 1999, at 4:00 P.M. to fully comply with Resolution No. 27-99.

4/ Appellants do not furnish copies of their applications and do not state the exact dates they submitted their applications. No copies of their applications are included in the record. However, Appellants' filings, as well as other materials in the record, show that Connelly applied for range units 185 and 253, Johnson applied for range unit 81, Racine applied for range unit 133, and Walter applied for range unit 30.

5/ Only Walter gives a date for his hearing. He states that his hearing was held on Feb. 8, 1999.

Connelly and Walter state that they were sent copies of this notice and that they completed and returned the required documentation prior to the March 12, 1999, deadline.

Connelly, Johnson, and Walter 6/ received written decisions following their hearings. The decisions were dated March 18, March 9, and March 19, 1999, respectively and were signed by the Chairman of the Allocation Committee. Each decision stated that the allocation application had been denied following appeal and that the decision was final. Each decision gave the reason for denial. In the cases of Connelly and Johnson, the reasons given were different than the reasons Connelly and Johnson state they were given at their hearings. 7/

On April 30, 1999, the Superintendent issued decisions concerning the range units applied for by Connelly, Johnson, and Racine. In one of two decisions addressed to Connelly, the Superintendent stated: "[I]n accordance with Blackfeet Tribal Council * * * Resolution No. 27-99 * * *, a decision was made to award you the allocation of grazing privileges on Range Unit(s) 185." In the second decision addressed to Connelly, concerning range unit 253, and decisions addressed to Johnson and Racine concerning range units 81 and 133, the Superintendent stated:

In accordance with the decision of the Blackfeet Tribal Allocation Committee * * *, I have decided to issue a permit for Range Unit [various numbers] to another applicant. If you wish to find out why your application was rejected, please contact the [Allocation Committee] or officials in the Blackfeet Tribal Agriculture Office.

The American Indian Agricultural Resource Management Act (AIARMA) [8/] offers tribal governments new opportunities for managing

6/ Racine does not specifically state that he received such a letter. Nor does he furnish a copy of such a letter with his notice of appeal. The other Appellants furnish copies of the letters they received.

7/ Connelly states that he was advised at his hearing that his application had been denied because of a delinquent debt to the Tribe. His post-hearing decision gave the reason for denial as "Late Application."

Johnson states that her representative was advised at her hearing that her application had been denied because she had not submitted adequate proof of ownership of the cattle that would be grazed on the range unit. Her post-hearing decision stated: "The Allocation Committee has determined that you presently have sufficient acreage to satisfy your livestock operation needs."

8/ Act of Dec. 3, 1993, Pub. L. No. 103-177, as amended, 25 U.S.C. §§ 3701-3746.

Indian agricultural lands. Indian farmers, ranchers, and allottees on the Blackfeet Indian Reservation may need to become heavily involved in tribal government to assure their interests are considered in the formation of tribal land management policies.

On July 16, 1999, the Superintendent sent a letter to Walter, with language identical to that just quoted, stating that he had decided to issue a permit for range unit 30 to another applicant.

In all cases, the Superintendent included information in his decisions concerning the right to appeal the decisions to the Regional Director.

All Appellants filed appeals with the Regional Director. On July 2, 1999, the Regional Director dismissed the appeals filed by Connelly, Johnson and Racine, stating in part:

Recipients of decisions issued by tribal bodies have recourse through whatever procedures have been established for decision reviews. For allocations, that process is appeal to the [Allocation Committee] by the terms of Resolution No. 27-99. Any further redress may be to the [Business Council] or tribal court.

In this new permit period, the [Business Council] gave the appeal authority on allocation decisions to the [Allocation Committee]. The BIA concurred in this process through 25 CFR 166.10. Allocation decisions are tribal decisions per [Resolution] No. 27-99. Therefore your appeal is dismissed for lack of jurisdiction.

Regional Director's July 2, 1999, Decision at 3.

On October 15, 1999, the Regional Director dismissed Walter's appeal for lack of jurisdiction, using language similar to that just quoted.

Discussion and Conclusions

On appeal to the Board, Appellants contend: (1) The Allocation Committee violated their right to due process by failing to provide adequate notice and opportunity to be heard; (2) BIA violated its trust duty to Appellants, as well as 25 U.S.C. § 3712, by failing to ensure that Appellants received due process from the Allocation Committee; (3) Resolution 27-99 is invalid because it is an ex post facto law; and (4) BIA failed to provide notice of Resolution 27-99 in accordance with 25 U.S.C. § 3712(b)(2). For these reasons, Appellants contend, the Board should find that the Regional Director has jurisdiction to consider their appeals.

Rather than address Appellants' specific arguments at this point, the Board turns to what it considers the pivotal question here)) whether the allocation decisions were entirely tribal decisions, as the Regional Director held, or whether the Superintendent shared responsibility for the allocations.

25 C.F.R. § 166.10 provides in relevant part:

A tribal governing body may authorize the allocation of grazing privileges without competitive bidding on tribal and tribally controlled Government land to Indian corporations, Indian associations, and adult tribal members of the tribe represented by that governing body. The Superintendent may implement the governing body's allocation program by authorizing the allocation of grazing privileges on individually owned land. The eligibility requirements for allocations shall be prescribed by the governing body, subject to written concurrence of the Superintendent.

The record shows that range units 81, 133, 185, and 253 include both tribal and individually owned land. ^{9/} Thus, according to 25 C.F.R. § 166.10, the Tribe and the Superintendent shared responsibility for authorizing allocation of grazing privileges on these range units. See also, e.g., Conway v. Billings Area Director, 20 IBIA 29 (1991).

It is apparent that the Regional Director has changed his view of BIA's role in allocation decisions. In earlier Board cases involving Blackfeet grazing allocation matters, the BIA decisions under review had addressed the merits of the cases, demonstrating BIA's recognition of its authority over the allocations at issue. See, e.g., Monroe v. Acting Billings Area Director, 21 IBIA 266 (1992); Conway, supra; LaPlante v. Billings Area Director, 19 IBIA 261 (1991).

In the decisions under review here, the Regional Director does not specifically discuss his change of position. Apparently, however, he bases his present position in part on a provision of the AIARMA, i.e., 25 U.S.C. § 3712. ^{10/} After quoting that provision, he states that

^{9/} The record does not show the composition of range unit 30.

^{10/} 25 U.S.C. § 3712 provides:

"(a) Tribal recognition

"The Secretary shall conduct all land management activities on Indian agricultural land in accordance with goals and objectives set forth in the approved agricultural resource management plan, in an integrated resource management plan, and in accordance with all tribal laws

the Business Council acted under authority recognized in the provision when it enacted Resolution 27-99. He makes specific mention of the appeal provision in Part VII of Resolution 27-99 and notes that the Superintendent approved that appeal procedure when he approved Resolution 27-99.

It appears possible that the Regional Director believes the present provisions of 25 C.F.R. § 166.10 have been superseded by 25 U.S.C. § 3712. The Board has held that, where there are discrepancies between a BIA regulation and a later-enacted statute, the statute controls. Collins v. Acting Billings Area Director, 30 IBIA 165, 172 (1997), and cases cited therein.

In this case, however, there is no readily apparent discrepancy between 25 C.F.R. § 166.10 and 25 U.S.C. § 3712, or between 25 C.F.R. § 166.10 and any other provision of the AIARMA. While 25 U.S.C. § 3712 requires that, as a rule, BIA must comply with tribal laws pertaining to Indian agricultural lands, it does not purport to relieve BIA of any part of its trust duty toward Indian landowners or of any specific responsibility assigned to the Super-

fn. 10 (continued)

and ordinances, except in specific instances where such compliance would be contrary to the trust responsibility of the United States.

"(b) Tribal laws

"Unless otherwise prohibited by Federal law, the Secretary shall comply with tribal laws and ordinances pertaining to Indian agricultural lands, including laws regulating the environment and historic or cultural preservation, and laws or ordinances adopted by the tribal government to regulate land use or other activities under tribal jurisdiction. The Secretary shall))

"(1) provide assistance in the enforcement of such tribal laws;

"(2) provide notice of such laws to persons or entities undertaking activities on Indian agricultural lands; and

"(3) upon the request of an Indian tribe, require appropriate Federal officials to appear in tribal forums.

"(c) Waiver of regulations

"In any case in which a regulation or administrative policy of the Department of the Interior conflicts with the objectives of the agricultural resource management plan provided for in section 3711 of this title, or with a tribal law, the Secretary may waive the application of such regulation or administrative policy unless such waiver would constitute a violation of a Federal statute or judicial decision or would conflict with his general trust responsibility under Federal law.

"(d) Sovereign immunity

"This section does not constitute a waiver of the sovereign immunity of the United States, nor does it authorize tribal justice systems to review actions of the Secretary."

intendent under 25 C.F.R. § 166.10 (such as the responsibility for authorizing the allocation of individually owned lands). In the absence of any direct conflict between 25 C.F.R. § 166.10 and the AIARMA, 25 C.F.R. § 166.10 remains a valid and binding regulation. 11/

Although 25 U.S.C. § 3712(c) authorizes the waiver of regulations, no such waiver has been granted here. The Board therefore finds that 25 C.F.R. § 166.10 governs BIA's role in the allocation decisions at issue in these appeals. As noted above, sec. 166.10 provides that the Tribe and the Superintendent share responsibility for authorizing the allocation of grazing privileges on range units which include both tribal and individually owned land.

The Regional Director also cites the Board's decisions in Risse v. Acting Aberdeen Area Director, 27 IBIA 304 (1995), and Johnson v. Billings Area Director, 32 IBIA 90 (1998), in support of his decisions. In Risse, the Board affirmed a BIA decision holding that the appellant's challenge to a tribal ordinance should be taken to a tribal forum, rather than BIA. In Johnson, the Board dismissed an appeal for lack of jurisdiction where the appellant sought to challenge tribal actions concerning the leasing of tribal land.

These Board decisions are relevant to some extent here, because Appellants' challenges are primarily to actions taken by tribal officials and to the validity of Resolution 27-99. These are issues over which the Tribe has primary jurisdiction. However, neither Risse nor Johnson involved a regulation like 25 C.F.R. § 166.10, which grants the Superintendent specific authority, and imposes upon him specific responsibility, for authorizing the allocation of individually owned land.

11/ On July 14, 2000, BIA published a proposed revision of 25 C.F.R. Part 166. 65 Fed. Reg. 43874. Proposed sec. 166.118 is titled "How do I acquire a permit through tribal allocation?" It provides in part:

"(a) A tribe may allocate grazing privileges on range units containing trust or restricted land which is entirely tribally owned or which contains only tribal and government land under the control of the tribe.

"(b) A tribe may allocate grazing privileges to its members and to tribally authorized Indian entities without competitive bidding on tribal and tribally controlled government land.

"(c) We [i.e., BIA] may implement the tribe's allocation procedure by authorizing the grazing privileges on individually owned Indian land.

"(d) A tribe may prescribe the eligibility requirements for allocations 60 days before granting a new permit or before an existing permit expires. The eligibility requirements are subject to our written agreement."

65 Fed. Reg. at 43939.

The Superintendent seems to have recognized his allocation authority insofar as range unit 185 was concerned. Although the Allocation Committee denied Connelly's application for allocation of this range unit and affirmed its initial decision following Connelly's appeal, the Superintendent nevertheless informed Connelly that the range unit had been allocated to him. Thus, it appears that the Superintendent may have overruled the Allocation Committee in this instance. Clearly, such an action would be inconsistent with a conclusion that BIA lacks jurisdiction over allocation decisions. That is, if BIA truly lacks jurisdiction over such decisions, as the Regional Director concluded, the Superintendent could not have altered the decision of the Allocation Committee concerning range unit 185. 12/

The Board concludes that the Regional Director erred in dismissing these appeals for lack of jurisdiction.

Despite this conclusion, however, the Board finds that the Regional Director was correct insofar as he recognized the primary jurisdiction of the Tribe over the issues raised by Appellants in these appeals. Clearly, the Tribe ought to have the first opportunity to address Appellants' due process allegations and their challenge to the validity of Resolution 27-99.

[1] In order to give effect to the Tribe's primary jurisdiction over these matters, while recognizing BIA's shared jurisdiction over the allocations, the Board authorizes the Regional Director, upon remand of these appeals to him, to stay the proceedings before him while Appellants take their allegations to tribal court or other appropriate tribal forum. Once a final tribal determination is rendered, the Regional Director may proceed to consider the appeals, giving appropriate deference to the decision of the tribal forum. 13/

12/ The Superintendent's Apr. 30, 1999, letter concerning range unit 185 does not state who made the decision to allocate the range unit to Connelly. Thus it is possible that the Allocation Committee changed its mind concerning this range unit, even though no document reflecting such a change of mind is included in the record.

The record as it concerns range unit 185 is puzzling. Despite the apparent allocation of the range unit to him, Connelly alleged in his appeal to the Regional Director that he had been denied allocation of that unit. The Regional Director did not address this apparent discrepancy. In his appeal to the Board, Connelly continues to allege that he was denied allocation of range unit 185.

13/ It is conceivable that the tribal court (or other forum) would find that it lacked jurisdiction to hear the challenges, either because of the provision in Resolution 27-99 making decisions of the Allocation Committee final, or for other reasons. However, the jurisdiction of the tribal forum in this matter is a determination to be made by that forum, not by BIA or this Board. In any event, an appellant before BIA or the Board cannot avoid a requirement to exhaust tribal remedies simply by alleging that no tribal forum has jurisdiction over the matter. Mosay v. Minneapolis Area Director, 27 IBIA 126 (1995).

Therefore, pursuant to the authority delegated to the Board of Indian Appeals by the Secretary of the Interior, 43 C.F.R. § 4.1, the Regional Director's July 2, 1999, and October 15, 1999, decisions are reversed, and these appeals are remanded to him for further proceedings. 14/

Anita Vogt
Administrative Judge

I concur:

Kathryn A. Lynn
Chief Administrative Judge

14/ In these further proceedings, the successful applicants for the range units at issue, as well as the Tribe, will be interested parties.